In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-46

ESTATE OF INEZ G. FASKEN,
Deceased.

KENNETH CORY, as State Controller,
Petitioner,

vs.

DAVID FASKEN, as Executor, etc.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the Supreme Court of the State of California

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STATEMENT OF CASE

When Inez Fasken died in 1968 she was a resident of California, and owned both real and personal property in each of the States of Texas and California.

The parties herein agree as to which properties are subject only to Texas and Federal death taxes (e.g. Texas ranches) and which are subject only to California and Federal death taxes (e.g. California

realty and the bank accounts in both states). The parties also agree that neither State herein may do indirectly what it is forbidden to do directly: levy taxes on properties having their taxable situs in another State.

The Texas properties account for 54.6869% of Mrs. Fasken's total estate. The California properties account for the balance of her total estate, 45.3131%. The Federal Credit for State Death Taxes, computed on Mrs. Fasken's total estate pursuant to Internal Revenue Code [I.R.C.] §2011, is $3,407,198.33.

The State of Texas, resorting to the computations under I.R.C. §2011, has assessed its death taxes at $1,863,291.14, which is exactly 54.6869% of the Federal Credit. The State of California, also resorting to I.R.C. §2011, has assessed its death taxes at $2,007,765.19 which is nearly 59% of the Federal Credit.

California (following an administrative regulation) asserts that $498,485.87 out of the $2,007,765.19 is its "pick-up" tax pursuant to I.R.C. §2011. The Executor has consented to, and in fact paid, California $34,627.87 out of the $498,485.87 "pick-up" tax assessment; thus, California has been paid total death taxes herein equal exactly to 45.3131% of the total allowable Federal Credit under I.R.C. §2011.

The sum of death taxes already paid to California and Texas equals exactly 100% of the Federal Credit. Not paid, and in dispute herein, is California's claim for $463,858.00 *more,* which it seeks as the purported balance of its "pick-up" tax.

Factually, the value of the *Texas* property, and that alone, accounts for the entire $463,858.00 tax which California seeks herein. Eliminate that property and you eliminate that claim.

On Federal due process grounds (among others) the Executor objected to and refused to pay California's "pick-up" tax assessment to the extent that it exceeded $34,627.87, i.e. to the extent that *California's assessment was based upon* Mrs. Fasken's *Texas* ranch (etc.) *property* and not upon her California property. Of the 11 jurists[1] who have ruled on the Executor's Objections, 10 have sustained his due process argument.

The California Supreme Court has held that when California sets its "pick-up" tax to take advantage of I.R.C. §2011 it must in multistate situations not collect a greater proportion of the Federal Credit for State Death Taxes (derived as it is from the total Estate) than the proportion which the Estate's California property bears to the Estate's total property. The Court points out that in this case California has approximately 45% of the total Estate property, and hence cannot use the Federal "pick-up" tax provisions to collect death taxes which exceed its 45% of the Federal Credit. The bar to a larger collection is the Federal Constitution, which prohibits each State from imposing a death tax, directly or indirectly, on property having its sole taxable situs in other jurisdictions. (See, e.g. *Treichler, infra.*) The unavoidable

[1]Including Commissioner E. L. Nininger, whose opinion (Appendix D to the Petition herein) is especially recommended by the Executor.

consequence of this constitutional limitation is the above ceiling imposed upon each State's "pick-up" tax collections. Accordingly, the Controller's claim to an additional $463,868.00 is denied *in toto*.[2]

WHY THE WRIT SHOULD NOT BE GRANTED

The California Supreme Court has held that the principles declared by this court in the case of *Frick v. Pennsylvania,* 262 U.S. 473, 44 S.Ct. 603, 69 L.Ed. 1058 (1925), *Treichler v. Wisconsin,* 338 U.S. 251, 70 S.Ct. 1, 94 L.Ed. 37, and its companion case, *Treichler, Executor v. Wisconsin* (per curiam) 340 U.S. 868, 71 S.Ct. 120, 95 L.Ed. 633, (1950) require the above limitation on its "pick-up" tax. The issues have been, according to the majority settled, and this Court's precedents compel this result. (Petition, Appendix A, pp. 24, 25.) Not one case is cited for having reached a contrary result.

And this result is wholly reasonable. It simply mandates that each State limit itself to its *pro rata* share of the total Credit. This has the incidental virtue of clarifying a potentially confusing situation and promoting certainty and simplicity to replace the erratic results which would follow from upholding the Controller's procedure. (That procedure requires, for example, that each State delve into the morass of inheritance and estate tax procedures of all other concerned states.)

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[2]Obviously, the limitation discussed is applicable only to state death taxes derived from the Federal Credit; it has nothing to do with other local death taxes.

The highest Court of our largest State has spoken. It remains only for this Court to speak and in denying this petition to reaffirm the basic sovereignty of each State and deny to all of them any asserted claim either by taxation or otherwise to exercise dominion over the property within a sister State. The California Court opinion *reminds* all concerned of this Court's previous holding on the necessity to apportion the Federal Credit. This Court's denial of the Writ will resolve any doubts and clear up any confusions which may remain. There is no need for a hearing. The Petitioner's reference to a Uniform Act is to a proposed Act which the National Conference of Commissioners no longer urges.

CONCLUSION

California seeks death tax dollars from Mrs. Fasken's Estate by virtue of the one simple fact that she died with a ranch, etc., in *Texas.* Those Texas properties are the sole reason for California's death tax claims herein. Had Mrs. Fasken died without any Texas assets California could not seek any death tax beyond what it has already been paid. Accordingly, this Court should deny the Writ.

Dated, San Francisco, California,
August 3, 1977.

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